Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CHRISTOPHER HOLYFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BETH L. KRULEWITCH
BETH L. KRULEWITCH P.C.
Counsel of Record for Petitioner
1608B Humboldt St.
Denver, Colorado 80206
(303) 906-8910

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Sixth Amendment right to trial by jury attaches to facts which if found would convert a sentencing range of ten years to life to a mandatory life sentence with no possibility of parole?

PRAYER

Petitioner, Christopher Holyfield, prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit handed down on April 3, 2007.

OPINIONS BELOW

The Tenth Circuit's decision in this case, as well as the district court's order pertaining to the propriety of enhancing Mr. Holyfield's sentence can be found in the Appendix at App. 1 to 32.

JURISDICTION

Jurisdiction in the district court was conferred by 18 U.S.C. § 3231. Jurisdiction in the Tenth Circuit was conferred by 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). This petition was originally due on July 2, 2007, however, on June 20, 2007, undersigned counsel requested a sixty-day extension of time. Justice Breyer, granted that request to and including August 31, 2007, in which to file a petition for writ of certiorari. This petition, filed within the time as extended, is therefore timely. Sup. Ct. R. 13.5.

CONSTITUTIONAL PROVISION INVOLVED

This petition raises issues involving the right to a trial by jury under the Sixth Amendment of the United States Constitution. That amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

> shall previously have been ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., Amend. VI.

STATEMENT OF THE CASE

Petitioner Christopher Holyfield was convicted of a federal offense, conspiracy to distribute over fifty grams of crack cocaine and over five kilograms of powder cocaine, after a jury trial in the United States District Court for the District of Colorado. Despite the fact that the overwhelming evidence showed that Mr. Holyfield was only a minor player in the overall drug conspiracy, the trial court found that his normal sentencing discretion[1] was eliminated due to Mr. Holyfield pleading guilty to a marijuana charge during the course of the charged conspiracy, which was his second felony drug conviction. Thus, instead of looking at a sentence range of ten years to life, the trial court found this second drug conviction required him to sentence Mr. Holyfield to an enhanced sentence of life imprisonment, with no possibility of parole.

On appeal to the Tenth Circuit Court of Appeals, Mr. Holyfield challenged the constitutionality of his sentence arguing it violated his Sixth Amendment right to trial by jury as articulated by this Court in *Apprendi v. New Jersey*,

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[1] Pursuant to 21 U.S.C. § 841(b)(1)(A), the sentence range for conviction of conspiring to possess with intent to distribute fifty grams or more of crack cocaine or five kilograms or more of powder cocaine is not less than ten years or more than Life.

530 U.S. 466 (2000) and its progeny. Specifically, Mr. Holyfield argued that the determination of whether his marijuana conviction, which occurred during the course of the charged conspiracy, was a *prior* conviction for sentence enhancement purposes, necessarily required the trial court to make *factual findings* regarding Holyfield's participation in the conspiracy subsequent to his marijuana conviction becoming final.[2]

On April 3, 2007, a panel of the Tenth Circuit Court of Appeals affirmed Mr. Holyfield's sentence, but avoided reaching the merits of Mr. Holyfield's argument finding instead that where a trial court's factual determination triggers a mandatory life sentence, such judicial fact-finding does not implicate the Sixth Amendment concerns articulated by *Apprendi*, if the life sentence was at least a theoretical possibility for the crime to which the defendant was convicted. Finding this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002) dispositive, the Tenth Circuit concluded that because the crime to which Holyfield was found guilty carried a sentence range of ten years to a maximum of life, raising the floor of the sentence to meet the ceiling, was nonetheless not an enhanced sentence for *Apprendi* purposes, because under *Harris* facts that increase the statutory minimum sentence can be found by a judge without running afoul of the Constitution.

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[2] In addition, Mr. Holyfield preserved for appellate review the issue of the continued vitality of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) which created a limited exception to the Sixth Amendment's jury trial requirement for the fact of a prior conviction.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S POST-*APPRENDI* DECISIONS IN *BLAKELY V. WASHINGTON* AND *UNITED STATES V. BOOKER* HAVE CAST DOUBT ON THE CONTINUED VITALITY OF *HARRIS V. UNITED STATES*, CAUSING CONFUSION AND CONFLICT AMONGST THE FEDERAL COURTS WHICH BEGS FOR CLARIFICATION BY THIS COURT.

Since announcement of *Apprendi v. United States*, this Court has evidenced its absolute fidelity to the Sixth Amendment right to trial by jury, as to any fact that "the law makes essential to the punishment" of a defendant. *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004); see also *United States v. Booker*, 125 S. Ct. 738 (2005); *Shepard v. United States*, 125 S. Ct. 1254 (2005). In the post-*Apprendi* decision of *Blakely* this court appeared to craft a test focusing on the impact of a fact on punishment rather than on strained distinctions between sentencing factors and offense elements to determine when judicial fact-finding must give way to the Constitutional guarantee of the right to a jury finding as to any fact which serves to increase a criminal defendant's sentence.

In *United States v. Booker*, this Court continued in this trend, by finding that federal sentencing guidelines could not be treated as mandatory, even if the sentence prescribed was within the sentencing range set forth by statute, if such were to comport with the dictates of the Sixth Amendment.

In the wake of these post-*Apprendi* decisions, courts and legal commentators alike have struggled to reconcile the "impact" of the "impact test" on the continued vitality of *Harris v. United States*, which permits judicial fact-finding to increase a sentence, so long as it only serves to raise the floor, not the ceiling, of a criminal defendant's sentence. As a

result, much judicial hand-wringing has occurred in trying to reconcile ar[illegible]proach which on the one hand subjects any fact which i[illegible]cts punishment to Sixth Amendment protections, versus a rule of law which excepts from this protection, facts which increase a mandatory minimum sentence. As one federal district court put it, "It is difficult to envision a situation in which a fact that determines a mandatory minimum is not considered 'essential' to punishment." *United States v. Malouf*, 377 F.Supp.2d 315 (D. Mass. 2005).

The facts of the present case illustrate how at its extreme, the continued validity of the rule announced in *Harris v. United States*, serves to elevate form over substance, as it defies logic that a factual finding which converts a sentencing range of ten years to life, to a mandatory life sentence with no possibility of parole does not impact a sentence such that it should be subject to the Sixth Amendment right to trial by jury. Given the confusion over the continued vitality of *Harris* in light of *Booker* and *Blakely*, and various methods by which lower courts are seeking to reconcile these decisions, see, e.g., *United States v. Greer*, 359 F.Supp.2d 1376 (M.D. Ga. 2005); *Malouf*, 377 F.Supp.2d at 325, Mr. Holyfield respectfully submits that his case presents the perfect vehicle for resolving this confusion.

CONCLUSION

This Court should grant Mr. Holyfield a writ of certiorari.

Respectfully submitted,

BETH L. KRULEWITCH
BETH L. KRULEWITCH P.C.
1608B Humboldt St.
Denver, Colorado 80206
(303) 906-8910

481 F.3d 1260

United States Court of Appeals,
Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Christopher **HOLYFIELD**, Defendant-Appellant.
No. 05-1318.

April 3, 2007.

Beth L. Krulewitch, Beth L. Krulewitch P.C., Denver, CO, for Defendant-Appellant.

Martha Ann Paluch, Assistant United States Attorney (Philip A. Brimmer, Assistant United States Attorney, with her on the brief), Office of the United States Attorney, Denver, CO, for Plaintiff-Appellee.

Before McCONNELL, BALDOCK, and TYMKOVICH, Circuit Judges.

TYMKOVICH, Circuit Judge.

A federal jury convicted Christopher Holyfield of conspiracy to distribute over fifty grams of crack cocaine and over five kilograms of powder cocaine, a crime with a sentencing range spanning ten years to life in prison. 21 U.S.C. § 841(b)(1)(A). The district court sentenced him to life in prison based on a minimum sentence statutorily mandated due to two prior convictions in California state court.

On appeal, Holyfield challenges the mandatory minimum as violating his Sixth Amendment right to jury trial. First, he claims the district court violated the Sixth Amendment by establishing his prior convictions without letting a jury decide whether the convictions existed or not. Second, he claims the district court violated the Sixth

Amendment by applying the minimum based upon two prior convictions when the second conviction overlapped with the conduct in the instant offense. Holyfield contends the overlapping nature of the offenses required a jury finding on whether he engaged in illicit activity after his 1998 state conviction for marijuana possession became final.

United States Supreme Court precedent forecloses both arguments. The Sixth Amendment is not violated where a judge determines the existence of prior violations. We therefore AFFIRM the life sentence.

I. Background

Christopher Holyfield was indicted along with nineteen others for a conspiracy to distribute over fifty grams of crack cocaine and over five kilograms of powder cocaine in violation of 21 U.S.C. § 846. Due to two prior state convictions, the Government notified the court prior to trial of its intent to seek increased punishment against Holyfield pursuant to 21 U.S.C. §§ 841(b) and 851 in the form of a mandatory minimum sentence.[1] A superseding indictment added a murder charge to Holyfield's indictment. Holyfield was subsequently acquitted of the murder

[1] The parties, district court, and even many of our prior decisions have referred to the mandatory minimum required by § 841(b) as a "sentence enhancement," *see United States v. McKissick*, 204 F.3d 1282, 1300-01 (10th Cir.2000); *United States v. Green*, 175 F.3d 822, 833-34 (10th Cir.1999), because the language in § 851(a)(1) requires notice if "increased punishment" will be based on prior convictions. We find discussing the prior convictions component of § 841(b) as a mandatory minimum rather than as an enhancement is more precise since it follows the language of the statute.

charge, but found guilty of the drug conspiracy. As a result of the mandatory minimum required by his two prior convictions, the district court sentenced Holyfield to life in prison.

Holyfield's two prior convictions were the result of guilty pleas in California state court (1) on August 18, 1993 for transporting cocaine, and (2) on July 13, 1998 for possession of marijuana for sale. The conspiracy charged in this federal case ran from October of 1996 through September of 2000, thus overlapping in part with the 1998 charges.

II. Discussion

Both of Holyfield's challenges to his § 841(b)(1)(A) mandatory minimum rely upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), so we review the question of whether his sentence violates that decision *de novo. United States v. Michel,* 446 F.3d 1122, 1132 (10th Cir.2006).

A. Apprendi Exception for Prior Convictions

The Supreme Court has held that the Sixth Amendment requires the government to submit to a jury facts which increase a crime's penalty beyond the statutory maximum to avoid a Sixth Amendment violation. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. Excepted from this rule is judicial fact-finding used solely to establish a prior conviction. *Id.* at 489-90, 120 S.Ct. 2348. To determine the "fact of prior conviction," a sentencing court may examine "the language of the statute of conviction, the terms of the charging document, the terms of a plea

agreement or transcript of colloquy between judge and defendant . . . , or to some comparable judicial record of this information." *United States v. Taylor,* 413 F.3d 1146, 1157 (10th Cir.2005) (internal quotations omitted).

Holyfield contends recent decisions by the Supreme Court portend the elimination of *Apprendi's* prior conviction exception, *see Shepard v. United States,* 544 U.S. 13, 26 n. 5, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *see also id.* at 27, 125 S.Ct. 1254 (Thomas, J., concurring) ("a majority of the Court now recognizes [the prior conviction rule] was wrongly decided."). While there may be some truth to Holyfield's contention, we have repeatedly rejected these types of challenges. "Unless and until the Supreme Court determines otherwise, we will continue to follow applicable precedent." *United States v. Moore,* 401 F.3d 1220, 1224 (10th Cir.2005); *see also United States v. Harris,* 447 F.3d 1300, 1303 n. 1 (10th Cir.2006) (same).

But even if the *Apprendi* exception for prior convictions was modified by the Supreme Court, Holyfield's appeal would still fail. The district court's fact-finding regarding the prior convictions did not raise Holyfield's sentence beyond the statutory maximum.

B. Sentence Did Not Exceed Statutory Maximum

Holyfield's alternative Sixth Amendment argument is that "[e]ven if the fact of a prior felony conviction need not be determined by a jury, where a prior conviction overlaps with [the instant] offense, additional factual findings are required to determine the propriety of using the overlapping conviction as a basis for [establishing a mandatory

minimum sentence] and thus must be found by a jury." Aplt. Br. at 13.

According to Holyfield, because the purpose of the prior conviction mandatory minimum sentence is to punish recidivists, a jury must find that recidivism occurred *after* the prior convictions are complete. He contends this overlap issue is one of first impression for the Circuit and engages the government over whether the additional facts needed to establish recidivism fall within the *Apprendi* exception for prior convictions. While having some appeal, we need not reach this contention. Supreme Court precedent makes clear that *Apprendi* does not apply in these circumstances.[2]

The year following *Apprendi,* the Supreme Court held that judicial fact-finding leading to a mandatory minimum sentence is permissible as long as the mandatory minimum sentence does not exceed the maximum sentence available under the jury's verdict. *Harris v. United States,* 536 U.S. 545, 567-68, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). The Court in *Harris* determined that Sixth Amendment jury protections only ensure that the defendant will get no "more punishment than he bargained for when he did the crime" absent a jury verdict or guilty plea; it does not ensure that he will get less. *Id.* at 566, 122 S.Ct. 2406. Accordingly, if the defendant faces no greater punishment because of judicial fact-finding, the rule of *Apprendi* does not apply: "[I]t does not include facts

[2] Holyfield also argues that the district court did not make a factual finding that he engaged in criminal conduct after the 1998 conviction. The record, however, is clear that Holyfield in fact engaged in criminal conduct after the conviction became final in July 1998 and before he began serving his sentence for that crime.

triggering a mandatory minimum. The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment." *Harris,* 536 U.S. at 561, 122 S.Ct. 2406 (citing *McMillan v. Pennsylvania,* 477 U.S. 79, 87, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)).

The Court's pronouncement in *Harris* followed from its earlier assertion in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added). Facts that increase a sentence, but not beyond the statutory maximum, historically were not deemed essential elements of a crime and need not be alleged in an indictment or found by a jury. (*But see* Thomas, J., dissenting: "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris,* 536 U.S. at 579, 122 S.Ct. 2406).[3]

The holding in *Harris* forecloses Holyfield's appeal. In this case, the two prior convictions set his mandatory minimum equal to the statutory maximum – life in prison – but did not push the sentence *beyond* that maximum. Due to the quantity of crack cocaine involved in the

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[3] Only a few months ago, the Supreme Court reiterated that the statutory maximum is the top of the applicable sentencing range "without finding an additional fact." *Cunningham v. California,* ___ U.S. ___, 127 S.Ct. 856, 865, 166 L.Ed.2d 856 (2007) ("In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.") (internal quotations omitted).

offense, Holyfield was eligible for a sentence ranging from ten years to life in prison. 21 U.S.C. § 841(b)(1)(A). Based on the two prior convictions, Holyfield was sentenced to life.

Since the sentence mandated by the prior convictions fell within the statutory range established before considering the prior convictions, *Apprendi* does not apply and the district court's sentence did not run afoul of the Sixth Amendment. *See also United States v. Estrada*, 428 F.3d 387, 390 (2d Cir.2005) (same; applying 21 U.S.C. § 841 mandatory minimum of life); *United States v. Dare*, 425 F.3d 634, 640-41 (9th Cir.2005) (same; applying mandatory minimum of ten years for brandishing a firearm).

III. Conclusion

Based on the foregoing analysis, we AFFIRM the district court sentence of life in prison.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Daniel B. Sparr

Criminal Action No. 00-CR-439-S

UNITED STATES OF AMERICA,
Plaintiff,

vs.

4. CHRISTOPHER HOLYFIELD,
Defendant.

ORDER

(Filed May 24, 2005)

THIS MATTER comes on before the Court on issues related to the sentencing of Defendant as a consequence of guilty verdicts found by the jury on December 15, 2003. Since that time, the Court has held numerous hearings on various aspects of the issues inherent in this sentencing.

As a preliminary matter, the Court held a hearing on April 14, 2004 at which it raised the subject of the Government's Notice of Intent to Rely upon Sentencing Enhancement under 21 U.S.C. §§ 841(b) and 851 [§ 851 Notice], filed June 27, 2001. Defendant stated that he intended to challenge that notice. Consequently, a briefing schedule was set.

The factual basis for the Sentencing Enhancement set forth in the Government's Notice was stated as Defendant's August 18, 1993 California state conviction for transportation of a controlled substance, cocaine and his

July 13, 1998 California state conviction for possession of marijuana for sale.

On June 1, 2004, Defendant filed his Sentencing Statement as well as his objections to the proposed sentencing enhancement. Those objections were titled as follows: 1) Violation of Section 846 Did Not Occur After Two Prior Convictions Had Become Final 2) Factors Supporting Sentence Enhancement Must Be Pled and Proven to a Jury Beyond a Reasonable Doubt, 3) Convictions were Obtained in Violation of the Constitution and May not be Relied Upon for Sentencing Enhancement, 4) Imposition of Extreme and Grossly Disproportionate Mandatory Life Sentence with No Possibility of Release would violate the 8th Amendment Prohibition Against Cruel and Unusual Punishment, 5) Government's Seeking Life Sentence with no Possibility of Release is Vindictive, Retaliatory and Violates Due Process and 6) Selective Imposition of Life Sentence Premised on Government's Suspicion that Defendant Murdered Dusty Thomas is Invidious and Violates Equal Protection.

Some of these objections have been disposed of previously, although not necessarily in a written order. For example, an argument was made in open court on July 15, 2004 regarding Objection 2, essentially that under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348 (2000), the Court could not make any findings of fact as to the prior convictions. The Court disagreed, referring to *Blakely v. Washington,* 124 S. Ct. 2531, 2536 which reemphasized a point made in *Apprendi.* "This case requires us to apply the rule we expressed in *Apprendi[,* 530 U.S. at 490]: '**Other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

jury, and proved beyond a reasonable doubt'" (emphasis added). In doing so, the Court went on to inform Defendant that his Objection 2 was rejected.

Similarly, the Court issued an *ex parte* order dated June 23, 2004 in regard to a request from Defendant for the issuance of some subpoenas. Without going into detail about the substance of Defendant's request, the Court found at that time that the requests related to Objection 4. Defendant was attempting to gain evidence that would show that the imposition of a mandatory life sentence with no possibility of release would be grossly disproportionate to the penalties sought against his other defendants and would therefore violate the 8th Amendment prohibition against cruel and unusual punishment. The Court rejected Defendant's request in that Order and went into some detail as to why it was doing so. In effect, the rejection of the request was also a finding that Defendant's Objection 4 was rejected.

Defendant's Objections 5 and 6 are really two parts of the same argument. In each, he alleges that he has been unfairly targeted by the Government for life in prison because the Government believes that he murdered Dusty Thomas, despite his having been acquitted of Count Two of the Superceding Indictment.

Some history of the case is relevant at this point. The original indictment in this case was filed September 28, 2000. The indictment named twenty defendants. Nineteen of those individuals were prosecuted basically simultaneously. In June and July of 2001, within a one week period, the Government filed four § 851 notices, including one on a defendant who was still a fugitive. At this time, there was

very little mention in the case about the homicide of Dusty Thomas.

While that incident had been a factor in the original prosecution of this case, it was not until the first trial date was imminent, in mid-August 2001, that various defendants chose to change their pleas and offer statements to the Government regarding that homicide. Although the trial was scheduled for August 13, 2001, twelve of the defendants changed their pleas within a week of that date, with two more doing so within two weeks of the trial date. These 14 defendants included three of the four against whom the Government had filed § 851 notices.

Viewed under these circumstances, it cannot be argued that the **filing** of the § 851 notices had any relation to the Government's beliefs about who murdered Dusty Thomas. In fact, it is the Court's recollection that the Government stated that it filed the notices against every defendant to whom that sentence enhancement could apply. Instead Defendant confines his position to arguing that it was the Government's decision to pursue the sentencing enhancement against him that constitutes the vindictive and invidious acts. It is his position that he was not offered any plea bargains based on the Government's suspicions about the murder.

The Tenth Circuit Court of Appeals has set forth clear standards for vindictive prosecution claims, sometimes in similar factual situations to those at hand in this case. To establish such a claim a defendant must prove either "(1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." *United States v. Vallo,* 238 F.3d 1242, 1249 (10th Cir. 2001), citing *United States v. Lampley,* 127 F.3d 1231,

1245 (10th Cir. 1997). In the *Vallo* case, the defendant argued that she was charged with murder "because she did not tell the government what it wanted to hear during the two debriefing sessions." *Id.* The trial court rejected that argument and the Circuit court agreed. "The Supreme Court has generally rejected the presumption of prosecutorial vindictiveness in the pretrial context. In the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* (citations omitted).

Similar statements have been found to apply to decisions to file § 851 notices. The First Circuit Court of Appeals found that filing a § 851 notice on the eve of a retrial, following a mistrial, did not rise to the level of vindictive prosecution. *United States v. Cartagena-Carrasquillo,* 70 F.3d 706, 715 (1st Cir. 1995). The Fourth Circuit Court of Appeals dealt with a situation in which a defendant believed that he was being 'punished' for repudiating his plea by the Government's filing a § 851 notice. *United States v. Morsley,* 64 F.3d 907, 920 (4th Cir. 1995). The defendant argued that the Government had targeted him for exercising his right to a jury trial.

> The holding in *Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), precludes this claim. There the Supreme Court upheld the actions of a prosecutor who threatened a defendant with further charges if he chose not to plead guilty, and later carried out that threat when the defendant invoked his right to a trial. This practice, the Court concluded, does not offend the Due Process Clause. 434 U.S. at 365, 98 S.Ct. at 669.

United States v. Morsley, 64 F.3d 907, 920 (4th Cir. 1995). Consequently, the Court found that the Government's prosecution of the defendant on the original charges "with the intent of obtaining a stiffer penalty than that originally bargained for in the plea agreement . . . was well within the bounds of *Bordenkircher.*" *Id.*

These authorities illustrate some of the reasons why Defendant Holyfield's fifth and sixth objections are without merit. As previously mentioned, it was not until the time of trial in August 2001 that the murder investigation became active again. Early that fall, Defendants Holyfield and Crooks came under suspicion based on newly available evidence. Nevertheless, on September 21, 2001, previous counsel for Defendant Holyfield filed a motion to continue the currently set trial date of November 28, 2001 based on the fact that, "The parties are engaged in serious plea negotiations[.]" Obviously that indicates discussions about a possible plea bargain. The fact that counsel described the discussions as "serious" and relied on them as a basis for a continuance are an indication of how beneficial to Defendant he thought those discussions might be. The Court can only presume that any plea that involved an admission of involvement in the murder of Dusty Thomas would not have been seen as so favorable.

Considering these facts, it is apparently Defendant's argument that the Government\'refused to consider any type of negotiated plea' is limited to the time period after he and Defendant Crooks had been implicated as suspects in the murder. That is a major distinction to the unqualified version of that statement. The fact that present defense counsel entered the case after it had been on-going for over 1½ years limits their perspective on the case.

Furthermore, Defendant's complaint that the Government was uninterested in information that he could provide about the drug conspiracy when he was debriefed in March 2002 begs the question. At that late date, with only 2 defendants remaining (with the exception of one fugitive), it was hardly surprising that such information was not helpful.

Factually, Holyfield's situation is most like the defendant in *Vallo* in that it is his position essentially that he is being punished for not telling the Government what it wanted to hear. That is no more valid in this case than it was in *Vallo*. To suggest that the Government is vindictively seeking to increase his sentence because he failed to admit to knowledge of or involvement in the murder is fanciful in the absence of any reason to believe that the enhancement would not have been pursued. While that is probably true of the time when the other three defendants with § 851 notices against them changed their pleas, Defendant was a party to negotiations at that time in which there is no evidence of any coercion or retaliation. Once it was determined that the Government had evidence to tie him to the murder, they were under no constraint to re-offer any previous concession. Defendant's fifth and sixth objections are rejected.

Defendant's first objection is that there has been no factual finding that he violated 21 U.S.C. § 846 after his two previous convictions became final. This is based on the fact that the jury verdicts did not include a question specifying the timing of the violation of § 846 other than during the multi-year period that the conspiracy was alleged. Furthermore, he argues that the Court cannot make such a finding pursuant to *Apprendi*.

Unfortunately for Defendant, the issue to which he refers is a legal one rather than a factual one. Consequently, *Apprendi* is not implicated by this determination. Defendant's situation, in which he had a conviction which technically falls within the dates of the conspiracy alleged in the indictment, is far from an unusual one. Despite Defendant's argument that the Court is being asked to do something extreme, similar facts have been considered by the courts numerous times.

The Government's brief refers to *United States v. Martino,* 294F.3d 346 (2d Cir. 2002). As is noted, that case involved a prior state conviction that involved drugs which were also part of the conspiracy charged in the federal indictment. *Id.* at 348. Despite that, the Second Circuit found that Martino's sentence should be enhanced pursuant to § 851 "if there is 'continued involvement' in criminality subsequent to the prior conviction." *Id.* at 351, quoting *United States v. Howard,* 115 F.3d 1151, 1158 (4th Cir. 1997). The court noted that this inquiry fit with the congressional intent of punishing recidivism.[1]

The Tenth Circuit has also subscribed to this view. In *United States v. Pace,* 981 F.2d 1123 (1992), the Tenth Circuit considered a situation which could well be considered more questionable than the one at hand. In that case, a co-defendant had been convicted of several substantive offenses which occurred over an eight month period and were prosecuted in a single case with a single indictment. The issue was whether the separate substantive counts

[1] The Second Circuit has considered its ruling in *Martino* in a *post-Blakely* context as well. *See United States v. Powell,* 404 F.3d 678 (2nd Cir. 2005). *Martino* was extensively quoted and relied upon in that opinion.

constituted "two or more prior convictions for a felony drug offense." § 841(b)(1)(A).

The Tenth Circuit found that "defendants prior substantive offenses constitute separate criminal episodes that occurred at distinct times." 981 F.2d at 1132 (citation omitted). The basis for this decision was the court's adoption of the test used in other circuits which considered whether "the prior offenses constitute separate criminal episodes or a single act of criminality." *Id.* While acknowledging the seriousness of the implications, the court found that this was "the most reasonable interpretation of the statute." *Id.*

Viewing the fact in this case in light of the inquiry set forth above, the Court has no hesitation in finding Defendant's 1998 California conviction was separate from his acts in Pueblo after that conviction. The Superceding Indictment charges a time period ending October 16, 2000, a lengthy period after the prior conviction. Furthermore, as the Government noted, the California incident involved in the 1998 conviction was not charged as an overt act in this conspiracy. In sum, the Court finds that Defendant's first objection is without merit.

Defendant's main argument is his Objection 3: Convictions were Obtained in Violation of the Constitution and May not be Relied Upon for Sentencing Enhancement. As a preliminary matter, Defendant sought to apply his argument to both his 1993 and 1998 convictions.

Title 21 U.S.C.A. § 851(e) is titled "Statute of Limitations." The language of that section unequivocally precludes consideration of a challenge to Defendant's 1993 conviction: "No person who stands convicted of an offense under this part may challenge the validity of any prior

conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." As stated previously, the Government's notice pursuant to § 851 was filed June 27, 2001. Consequently, only convictions after June 27, 1996 could be challenged by Defendant pursuant to the terms of this statute. Defendant stated his objection to this ruling but then proceeded with his challenge of the 1998 conviction.

The Court held six hearings over a six month period on the § 851 issue. Some of these hearings included both parties and some were hearings with just Defendant on *ex parte* defense issues related to § 851. Due to the seriousness of the possible consequences, the Court attempted to allow Defendant every reasonable resource and opportunity to make his argument.

The evidentiary part of the hearing process began with the Government's production of evidence pursuant to § 851(c)(1) designed to prove the validity of both Defendant's 1993 and 1998 convictions. Both testimonial and documentary evidence were produced at the September 29, 2004 hearing. Particular attention was paid to the court proceedings on Monday July 13, 1998. While Defendant thoroughly cross-examined each of the Government's witnesses and scrutinized their exhibits, Defendant did not make any real argument that the Government had not fulfilled its burden of proving the fact of the existence of the two convictions.

At that point, Defendant then proceeded to make his presentation to fulfill his burden pursuant to § 851(c)(2) by a preponderance of the evidence. Defendant's presentation was quite protracted. It began with testimony from two of his co-defendants. It then continued with testimony from

several relatives and later, testimony from an expert witness. While the Court frankly informed Defendant that it deemed his burden to be a particularly onerous one as he was attempting to present evidence about his state of mind on a particular day more than six years earlier, the Court attempted to give Defendant every reasonable opportunity to show that his 1998 conviction was unconstitutional.

The standard by which the validity of Defendant's 1998 guilty plea must be considered is not disputed. Of course, the Court must begin with the principle that "the presumption of regularity [] attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley*, 506 U.S. 20, 29 (1992) (citation omitted). It is from that starting point that Defendant must begin.

"A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States . . . shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." § 851(c)(2). Further, as pointed out by Defendant, the "test must be whether [Defendant had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402 (1960). Further, he must have made a knowing and intelligent waiver of the constitutional rights. *Parke,* 506 U.S. at 28.

Defendant presented evidence from five witnesses. As previously stated, at the September 2004 hearing, he called co-defendants Lionel Amos and Wallace Crooks. At the October 2004 hearing, he called Charles Holyfield, his

brother, and Latrice Holyfield, his wife. In November, the testimony of his expert, Michael Gendel, M.D., was presented.

Non-expert Witnesses

All four of Defendant's non-expert witnesses testified about his addiction to crack cocaine. For example, Lionel Amos testified that for most of 1997 to 1999, he saw Defendant every day, and in fact, lived with him in California for part of that period. According to Amos, Defendant was essentially high on crack all the time. While he did allude to an earlier time, possibly 1995, when Defendant was able to stay sober for eight or nine months, Amos testified that during the later period while they were both still in California, Defendant had a severe problem with crack cocaine that was obvious to all of his family and friends.

Nevertheless, on cross examination, Amos made it clear that he did not go to court with Defendant in California and had no specific recollection of the day that Defendant entered his change of plea in 1998. He further testified that during this period of severe addiction, Defendant had burns on his nose and his fingers from lighting the crack pipe and emitted a certain odor caused by smoking crack. In general, Amos described Defendant as being high most of the time during this period and said this was easy to recognize because of Defendant's complete lack of focus on events around him (i.e. being 'in the zone') and his resulting failure to communicate based on the severe state of distraction. Finally, he stated that even during the brief periods when Defendant was not high during this time, his addiction remained obvious because of the lingering physical effects.

Wallace Crooks gave similar testimony. During the time period of 1996-1998, Crooks also lived near Defendant in California and saw him several times a week. The time periods of the events in Crooks' testimony were difficult to follow because of inconsistencies. He stated that Defendant and Crooks' brother-in-law Theodore owned a hauling business during that period of time but he also became aware that Defendant had begun using crack again because of his lack of reliability regarding the business. He estimated that he was aware of this problem in the fall of 1998. Crooks' testimony differed from Amos' in that he said that after Defendant had come down from his high, he "acted like a normal dude." (9/29/04 Transcript of Testimony at p. 136, ll. 8-9.) The exception to that was Crooks testimony that after a heavy bout of smoking, Defendant often needed a day or so to recover.

Crooks could not testify about Defendant's state of mind around the time of Defendant's July 1998 hearing because Crooks was not sure whether he had been released from prison in Oregon at that time. When asked about Defendant's appearance during the period when Crooks saw him regularly in California, Crooks stated that it was obvious that Defendant was an addict because of his failure to pay any attention to his personal appearance as well as his severely reduced weight.

Defendant's brother Charles Holyfield testified on October 7, 2004. He said that he saw a great deal of Defendant at the time at issue, and in fact lived with him for a while. Charles stated that he got into fights with individuals who were providing drugs to his brother because it was clear how much damage the crack was doing to Defendant. He also stated that he remembered

Defendant's arrest and the resulting court case in July 1998, although he was not present at either. Charles was sure that Defendant's use of crack cocaine was continuing throughout that period. He not only saw Defendant consuming crack but could also clearly see the physical manifestations such as the burns on his fingers and nose. Charles stated that he remembered being upset with Defendant just before he went to the July 1998 court date because Defendant had been smoking crack all night and so was still high the next morning.

Charles said several times that Defendant was generally extremely paranoid when he had been smoking crack. Consequently, although he claimed that a person who was not aware of Defendant's drug habit would not recognize when Defendant was high, he later admitted that either the burns on his face and hands or his paranoid nature would be likely to give him away. In particular, on the morning of Defendant's July 1998 hearing, Charles stated that Defendant was high when he left for work at approximately 5:30 a.m. and that while Defendant was trying to pull himself together, it was apparent from observing his large glassy eyes and his manner that he was still high. (10/7/04 Transcript at p. 26, l. 22 – p. 27, l. 11.) By the end of his cross-examination though, Charles was vacillating as to whether the day to which he was referring occurred in 1997 or 1998 so his observations are of dubious value.[2]

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[2] Similarly, while Charles stated that he believed that Defendant was working for Fito-Lay in the 1997-98 period, Latrice agreed with Lionel Amos that Defendant had been fired from that position several years earlier.

Defendant's wife, Latrice Holyfield testified just after Charles. Her testimony was fairly consistent with his. While she could not remember the specific hearing in question, other than believing that it was the day that a particular photo of herself and Defendant was taken, she said that he always smoked crack on the evenings before he had to go to court. She stated that she tried to discourage him from doing that and warned him that he could cause more trouble for himself if he went to court while he was high and the court officials were not aware of his condition. (10/7/04 Transcript at p. 40, ll. 13-16.) No explanation was given for that concern on her part. It was Latrice's belief that the hearing ended with Defendant receiving a sentence of probation. She said that made Defendant happy and relieved because most of all, he just wanted to get the experience completed and be able to go home.

When questioned on cross-examination, Latrice stated that the hearing to which she was referring began at eight o'clock or nine o'clock in the morning but that it lasted less than an hour. She stated that Defendant's eyes looked like they were bulged out and that in general at this time, his lips would also be burnt, and therefore black, from the crack pipe. She described his burnt nose as having an obvious blister on its tip. When asked about Defendant's demeanor on the day of the hearing, she said he was quite withdrawn and that while he appeared to understand what was said to him, his responses were generally monosyllabic.

Latrice also recounted that she accompanied Defendant to most of the appointments with his probation officer that resulted from the July 1998 guilty plea, although she waited for him in the lobby. As clarified by questions from

the Court, Latrice said that after she and Defendant returned home from court at approximately ten or eleven o'clock that morning, Defendant left briefly and then spent the rest of the day in their bedroom getting high. She also reiterated that she was sure that Defendant was sentenced to probation that day rather than either being taken into custody or being told to self-surrender at a later date. She clearly stated that she did not recall Defendant be ordered to report to jail the next month, and that she would have remembered if he received a jail sentence, no matter when it was to start.

Expert Witness

On November 5, 2004, Defendant's expert, Michael H. Gendel M.D. testified. Dr. Gendel is a psychiatrist and was qualified as an expert in the speciality of addiction psychiatry, over the Government's objection.

By way of background, Dr. Gendel prepared for his testimony by doing several things. He reviewed the testimony of Charles and Latrice Holyfield. He also did an interview/examination of Defendant which lasted approximately three hours. The doctor testified that accepted methods of forensic psychiatry allow individuals in his capacity to make determinations about a subject's state of mind years after the time being considered. These include examining the consistency (or lack thereof) of statements by others with knowledge of the subject at the relevant time as well as consideration of the manner in which the subject presents his or her information to the examiner. Of course the psychiatrist also uses his or her knowledge of various illnesses to evaluate the information given by the subject. Dr. Gendel explained that the role of a forensic

psychiatrist often involves evaluating mental states years after the time being considered.

Dr. Gendel's examination of Defendant found that at the time of the July 1998 change of plea, Defendant's personality when he was high on crack could be characterized as "highly withdrawn [and] relatively mute." (11/5/04 Transcript at p. 31, l. 7.)

In considering the testimony of Defendant's wife and brother, the doctor determined that when Defendant went to court on July 13, 1998, he would have still had cocaine in his system, which would have caused him to experience psychotic symptoms, probably including auditory hallucinations, paranoid feelings, depression and a craving for cocaine. In particular, Dr. Gendel explained, it is very likely that Defendant was terribly afraid that people in the courtroom would be able to see into his mind and realize that he had taken cocaine. His fear was so overpowering that he was unable to deal with anything that should have been of importance to him in that situation such as the plea bargain offered to him or his communications with his counsel. Instead, he was obsessed with his need to qet out of the courthouse.

It is the doctor's opinion that Defendant's guilty plea on July 13, 1998 was not knowing and voluntary because he had a psychotic disturbance which caused him to plead guilty so that he could leave the building as quickly as possible. He also opined that it is unlikely that Defendant would have been able to have an appropriate ability to consult with his lawyer. Based on that inability, Dr. Gendel believed that Defendant did not have a rational and factual understanding of the proceedings against him

and therefore was not competent at all, in a legal sense. p. 37.

When cross-examined about the sources upon which he relied to reach his conclusion about Defendant's mental state on July 13, 1998, Dr. Gendel stated that he paid particular attention to the testimony of Latrice Holyfield because of the consistencies between her testimony and what Defendant told the doctor. He also noted that the p, of the change of plea on that day was also consistent with his findings, although he admitted that the minimal colloquy in the transcript could support other interpretations as well. (11/5/04 Transcript at p. 38, ll. 14-17.)

Particularly puzzling were Dr. Gendel's discussion about his reasons for not attempting to contact Defendant's counsel who appeared at the July 1998 hearing. When asked if he had assumed that Defendant's public defender was sophisticated in relation to a regular person with regard to drug use and addiction, the doctor said he had but nevertheless said that he believed that the symptoms being exhibited by Defendant at that hearing would not have been visible to his defense counsel.

Dr. Gendel stated this despite his opinion that it is likely that anyone paying attention could have seen Defendant's burns and blisters. He explained that seeing that would not necessarily have been relevant to anyone. His explanation for that was that such physical manifestations might be common in that court setting and therefore were not likely to arouse suspicion about an individual's state of mind. Furthermore, despite this admission about Defendant's visible manifestations of a crack addiction, Dr. Gendel stated that he did not see any value in contacting Defendant's state public defender because it would add

nothing to his analysis if the attorney agreed with his diagnosis and would not sway the doctor's opinion if the attorney disagreed with his analysis because the doctor believed that Defendant's psychosis would not be visible. He merely stated that he was not interested in asking the public defender about whether he saw the burns and blisters. (11/5/04 Transcript at p. 60, ll. 12-14.)

After being cross-examined, the Court had some questions for Dr. Gendel which raised some interesting responses. For example, Dr. Gendel stated that when Defendant told him about his discussions with his attorney, which included the substantial change from an intent to go to trial to a desire to accept a plea, there were no indications that Defendant had any trouble with those conversations, aside from the general statement that Defendant said that it was difficult for him to talk to anyone that morning. P. 77-78. It was estimated that this discussion with counsel lasted between one and one-half, and two hours. (91). Again, Defendant related that he was still suffering from extreme paranoid belief that people could see into his head during that time, (94) and the doctor suggested that problem may have continued for several more hours.

With regard to the discussion about hallucinations, Dr. Gendel said that after Defendant agreed that he had had audio and visual hallucinations, Defendant described both some hallucinations specific to stimulant addictions and other more general hallucinations as well. When Defendant was asked about some types of hallucinations that are specific to other types of psychosis, without Defendant being told about that limitation, he told the doctor that he had not experienced those. In particular, he confirmed that he did hallucinate about police officers, a

typical hallucination of stimulant addicts, but declined to say that he suffered from other hallucinations which would have been unusual for a crack addict. These consistent answers helped convince Dr. Gendel of the veracity of Defendant's statements.

Analysis

As previously noted, when the subject of Defendant's competency at his 1998 change of plea hearing was initially raised, the Court voiced its skepticism about attempting to look backward at a person's demeanor on a certain day six years ago. In fact, some of Defendant's characteristics on the day in question were longstanding enough so that they are not confined to that particular day.

It is clear that Defendant was addicted to crack cocaine in July 1998. This condition existed before that time and continued for quite some time afterward. All the witnesses who knew Defendant well agreed on this fact. By and large they also agreed about the way that he acted when he was high on cocaine. He was introverted and noncommunicative and generally paranoid. The observations of Defendant's friends and family appeared to be consistent with the expert, Dr. Gendel's description of the demeanor of an individual who was high on crack cocaine.

Beyond the general description of common characteristics of someone with Defendant's affliction, comes the testimony about his activities on the day in question. Only one of Defendant's lay witnesses professed to have knowledge of the events of the specific day he changed his plea. The one witness who stated that she had detailed knowledge of Defendant's activities on July 13, 1998 was his

wife Latrice. She testified that she always went to his court hearings with him. She also testified that she specifically remembered this day and this trip to court. Unfortunately, it is clear from the evidence that her memory of that day is faulty.

The Court does not find that Latrice purposely made any false statements. It appears that she was actually quite concerned about giving truthful testimony, as illustrated by her repeated limitation ". . . . if I remember correctly." Nevertheless, the events of the day she described are inconsistent in numerous crucial ways from the verifiable events of July 13, 1998. It is likely that the important details of her testimony referred to an entirely different day that she went to court with Defendant. The major examples of the inconsistencies in her recollection relate to the events that happened at the courthouse. Not only did she state that they were finished at the courthouse by the late morning but she was also quite sure that Defendant was pleased when they went home because he had received a sentence of probation. Neither of these is true. Although Defendant's original appearance was in the morning, Government's exhibit 712 establishes that his change of plea started at 3:20 p.m. Furthermore, he received a jail sentence on the charge, although he received a stay of execution until the next month. Based on these major inconsistencies that go to the heart of the matter, the Court must disregard the testimony of Defendant's wife.

The issue of timing also caused problems with the testimony of Dr. Gendel. Although it appears that he reviewed the pertinent exhibits, he clearly relied upon the sequence of events as set forth by Latrice Holyfield, and

confirmed by Defendant during his examination, to formulate his expert opinions. This is important because of what the doctor referred to as the neurobiology of cocaine. On direct examination, Dr. Gendel stated that cocaine stays in the blood stream for approximately five hours after it is ingested. (11/5/04 Transcript at p. 37, ll. 2-3.) On cross-examination, he lengthened that to between five and seven and one-half hours. Nevertheless, if Defendant stopped smoking crack at approximately 4:00 a.m., as was stated by Defendant and Latrice, he may or may not have had cocaine still in his system when the original decision was made that morning not to go to trial. In any event, it was clearly not in his system by 3:20 in the afternoon when the change of plea session started.

The Court is also concerned about Dr. Genders testimony regarding some of the methods he employed while interviewing Defendant. Obviously the doctor is an experienced interviewer and the Court is hesitant to question his practices. It is also clear that the doctor was well aware of the complicated set of underlying motivations that would have affected Defendant's statements to him. Nevertheless, the Court was concerned, for example about how the doctor stated that he was impressed most by "information which [Defendant] wouldn't have told me about." (11/5/04 Transcript at p. 47, ll. 14-15.)

In other words, it appears that Dr. Gendel gave a great deal of weight to answers in which Defendant agreed with statements by the doctor, such as an inquiry about hallucinations. It would be simplistic to say that the doctor was impressed that Defendant agreed that he had suffered from hallucinations, although Defendant did not mention them until asked. As noted, Defendant also denied other

symptoms which would not be common with crack addictions and those denials reinforced Dr. Gendel's belief in the truthfulness of Defendant's statements. Still, the Court cannot help but think that it would have been more impressive for Defendant to have volunteered appropriate symptoms on his own.

Similarly, the Court is concerned with what it considers a crucial unanswered question about how Dr. Gendel could be so sure that Defendant's counsel at the July 1998 hearing would have been oblivious to the fact that his client was in a psychotic state when pleading guilty. This is despite the fact that counsel was aware that Defendant had previously been vehement in his desire to go to trial on this charge and it is likely that this attorney was "sophisticated . . . in seeing signs of intoxications or drug use." [11/5/04 Transcript at p. 58, ll. 18-21].[3] The Court finds it unlikely that such an attorney would be unaware of Defendant's extreme state, as described by Dr. Gendel, or that he would allow his client to plead guilty knowing he was in such a state.

Another problem with the testimony of Dr. Gendel is the sweeping nature of his opinions. By that the Court refers to the fact that it does not appear from Dr. Gendel's testimony that there is much, if anything, that would cause him to describe Defendant as anything but a typical crack addict. In fact, much of his testimony seemed to rely

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[3] Government's exhibit 728 includes an identification of Defendant's counsel, Michael Curls, as an "Alternate Defense Counsel." Research has revealed that this designation applies to an office of attorneys which is assigned to cases when the local Office of the Public Defender cannot accept an appointment because of a conflict of interest. Consequently, they are essentially alternate public defenders.

on the fact that answers that Defendant gave to the doctor's inquires were deemed credible because they fit with the doctor's knowledge of crack addicts in general. With that being the situation, the unavoidable implication is that no crack addict would ever be able to enter a guilty plea because he or she would be unable to give a knowing and voluntary waiver of their constitutional rights. This Court is not willing to ascribe to such an extreme position.

The Court must emphasize that its opinions about the testimony of Dr. Gendel have not been influenced by the difficulties involved in the doctor's appointment and compensation. While those complications had several regrettable aspects, the Court accepted Dr. Gendel as an expert in the proffered fields and gave his testimony due consideration. Furthermore, the Court is well aware that Dr. Gendel is not a "professional witness." That fact, when added to his considerable credentials and his obvious belief in the matters about which he was testifying are enough to give the Court pause in deciding to essentially disregard his testimony. Nevertheless, for the reasons set forth above, the Court finds that Defendant has not met his burden of proving by a preponderance of the evidence that his July 1998 conviction was unconstitutional.

Having determined that Defendant has two prior final convictions for felony drug offenses as established according to the procedures set forth in 21 U.S.C. § 851, the Court must proceed to sentence him pursuant to 21 U.S.C. § 841(b).

It is, therefore, ORDERED that Defendant's objections to the Sentencing Enhancement pursuant to 21 U.S.C. § 851 are rejected.

It is further ORDERED that counsel shall make their calendars available for the setting of Defendant's sentencing hearing. It is the Court's intent to hold that hearing at the earliest practicable date.

DATED at Denver, Colorado, this 24th day of May, 2005.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
Senior United States District Judge